Supreme Court, U. S.
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No. 71-1007

In the Supreme Court of the United States

OCTOBER TERM, 1971

REGENCY REALTY, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The Tax Court denied petitioners' motions without filing an opinion. The opinion of the court of appeals (Pet. App. B 1a–2a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1971. A petition for rehearing was denied on September 10, 1971 (Pet. App. C 2a). By order dated December 6, 1971, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including February 7, 1972 (Pet. App. D 3a). The petition was filed on February 7, 1972. The juris-

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diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Tax Court had jurisdiction to entertain petitioners' motions for leave to file motions to vacate decisions, and, if so, whether the court abused its discretion in denying the motions.

STATUTES AND RULES INVOLVED

The pertinent provisions of Sections 7481 and 7483 of the Internal Revenue Code of 1954, of Rule 13 of the Federal Rules of Appellate Procedure, and of Rules 19(f) and 31 of the Tax Court's Rules of Practice are set forth in the Appendix, *infra*, pp. 9–10.

STATEMENT

Petitioners are 17 related corporations of which Milton Kirsner is president. The Commissioner determined deficiencies and penalties against petitioners totalling approximately $346,000 for taxable years from 1958 through 1964. On July 9, 1968, petitions were filed in the Tax Court by their attorneys, Arnold Fleishmann and Samuel L. Silber, who had been retained by Mr. Kirsner. Both before and after the petitions were filed, Messrs. Fleishmann and Silber engaged in settlement negotiations with representatives of the Internal Revenue Service. (Pet. 5; R. 1–13, 111–115.) [1]

[1] "R." references are to the separately bound record appendix in the court of appeals, a copy of which we have lodged with the Clerk of this Court. The pleadings relating to Regency Realty, Inc. are set forth in that appendix (pp. 1–23) as representative of the pleadings relating to all 17 corporations.

By letter dated May 14, 1969, Mr. Kirsner offered on petitioners' behalf (R. 49) $150,000 "in full settlement of all taxes and penalties for the taxable years involved in the pending litigation." On July 1, 1969, stipulated decisions were entered in petitioners' 17 cases requiring payment of a total of $150,000 in taxes and penalties. In each of these decisions it was stipulated, over Kirsner's signature, that "petitioner waives the restrictions, if any, contained in the applicable Internal Revenue laws on the assessment and collection of the deficiency in tax and addition to the tax, *plus statutory interest*." (Emphasis supplied.) (R. 25–47.)

About August 1, 1969, petitioners received statements for a total of $150,000 in taxes and penalties, plus approximately $38,000 in statutory interest (R. 48). On September 29, 1969, 90 days after the stipulated decisions had been entered, new counsel for petitioners filed motions for leave to file motions to vacate the decisions, and motions to extend petitioners' time for appeal (R. 48–53). At a hearing on the motions on November 19, 1969, Kirsner testified that his former attorneys had not explained the interest factor to him when he signed the stipulations; that he was in disagreement with them generally over the terms of settlement; and that he executed the decisions "under duress" (R. 78–80). He also testified that during 1969 he received medical care for a tumor (R. 74, 77); that he had been seeing a psychiatrist about every three weeks since World War II (R. 74, 83); and that he had had difficulty in retaining new counsel after the

stipulated decisions were entered and the tax bills rendered (R. 75–77).

The Tax Court ruled that Kirsner, by his testimony, had waived the attorney-client privilege as to his former counsel (R. 84). Mr. Silber, Mr. Fleishmann and an associate testified that Kirsner had been advised that interest would be due on any deficiency agreed to in the settlement, and that at no time did Kirsner express any displeasure with the settlement by reason of the inclusion of interest (R. 86, 88, 99, 102). Mr. Silber further testified (R. 88) that he and former co-counsel were suing Kirsner for fees "based on the saving of taxes and penalties as well as interest."

Counsel for the Commissioner urged primarily that the stipulated decisions had become final prior to the hearing, and that the court was without jurisdiction to entertain petitioners' motions (R. 65–68). The court did not pass on the jurisdictional question, but indicated that it would deny the motions on the merits because there was no showing that Kirsner's medical and mental problems had affected his understanding of the settlement, or that he had executed the stipulated decisions under duress (R. 107). On August 24, 1970, the court denied the motions. (Pet. App. A 1a). The court of appeals affirmed the Tax Court's order *per curiam*, stating that it found no abuse of discretion in the denial of the motions (Pet. App. B 1a–2a).

ARGUMENT

The decision below is correct. There is no conflict or any other reason for further review.

1. In the form applicable when petitioners' motions were filed, Section 7481(1) of the Internal Revenue Code of 1954, Appendix, *infra*, p. 9, provided that a Tax Court decision became final if a petition for review was not filed within the time allowed therefor, and Section 7483, Appendix, *infra*, p. 9, specified that a petition for review had to be filed within three months of the date of decision. It is recognized, however, in Rule 13(a) of the Federal Rules of Appellate Procedure, Appendix, *infra*, pp. 9–10, that the running of the time for appeal is suspended by a motion to vacate or revise a decision which is timely filed under the Rules of Practice of the Tax Court. In turn, Rule 19(f) of the Tax Court's Rules of Practice, Appendix, *infra*, p. 10, provides that:

> No motion to vacate or revise a decision may be filed more than 30 days after the decision has been entered, except by special leave.

Accordingly, a motion to vacate a Tax Court decision is untimely and does not postpone the finality of the decision by suspending the running of the time for appeal if it is filed more than 30 days after the decision is entered. *Commissioner* v. *Realty Operators*, 118 F. 2d 286 (C.A. 5); *Denholm & McKay Co.* v. *Commissioner*, 132 F. 2d 243, 248 (C.A. 1); cf. *Morse* v. *United States*, 270 U.S. 151, 154. And, in the absence of a showing of fraud on the court, the Tax Court has no jurisdiction to vacate or modify its decisions after they have become final. *Lasky* v. *Commissioner*, 235 F. 2d 97 (C.A. 9), affirmed *per curiam*, 352 U.S. 1027; *R. Simpson & Co.* v. *Commissioner*, 321

U.S. 225; *Helvering* v. *Northern Coal Co.*, 293 U.S. 191; *Kegner* v. *Commissioner*, 387 F. 2d 689, 691 (C.A. 7).

In the case at bar, petitioners did not file their motions for leave to file motions to vacate until 90 days after the stipulated decisions were entered—two days before the appeal period would expire. They did not file petitions for review. Thus, the decisions became final three months from the date of decision. Petitioners have never alleged fraud on the court. It follows that the Tax Court had no jurisdiction to entertain petitioners' motions for leave to file motions to vacate the decisions.

2. Assuming *arguendo* that the Tax Court had jurisdiction, the court of appeals correctly held (Pet. App. 1-2a) that the denial of the motions did not constitute an abuse of discretion. It suffices, as the Tax Court noted (R. 107), that there was "no testimony whatsoever" that Kirsner's ailments affected his understanding of the settlement, and no affirmative evidence (apart from Kirsner's assertion) that he made his offer in settlement and executed the stipulated decisions under duress.

Petitioners contend, nevertheless, that the Tax Court committed reversible error in overruling their claim of the attorney-client privilege and allowing the attorneys who represented them in the Tax Court to

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Petitioners' motions for extension of time for appeal (R. 50), also filed two days before the period for appeal expired, could not be treated as petitions for review since they did not evidence a present and unequivocal intention to appeal. 9 Moore's *Federal Practice* (2d ed.), par. 203.09.

testify that they explained to Mr. Kirsner the interest factor in the settlement. This was not error, much less prejudicial error.

It is well-settled, as stated in 8 Wigmore, *Evidence* (McNaughton rev. 1961), § 2327, that: "[w]hen the client alleges a breach of duty to him by the attorney, the privilege is waived as to all communications relevant to that issue." Thus, this Court held in *Hunt* v. *Blackburn*, 128 U.S. 464, 470–471, that when the client there involved "entered upon a line of defense which involved what transpired between herself and [her attorney], and respecting which she testified, she waived her right to object to his giving his own account of the matter." This rule of evidence is applied in the District Court for the District of Columbia (*United States* v. *Wiggins*, 184 F. Supp. 673), and is therefore made specifically applicable in Tax Court proceedings by Rule 31 of the Tax Court's Rules of Practice, Appendix, *infra*, p. 10. None of the decisions invoked by petitioners (Pet. 10–11) is in derogation of the rule, as appears from petitioners' own summary of them.

Mr. Kirsner testified that petitioners' attorneys in the Tax Court did not explain the interest factor to him, and that he was in disagreement with them generally over the terms of settlement (R. 78–80). Under the established rule he thereby waived the attorney-client privilege which might otherwise have precluded the attorneys from testifying about these matters.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1972.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C. (1964 ed.)):

SEC. 7481. DATE WHEN TAX COURT DECISION BECOMES FINAL.

The decision of the Tax Court shall become final—

(1) *Timely petition for review not filed.*—Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

* * * * * *

SEC. 7483. PETITION FOR REVIEW.

The decision of the Tax Court may be reviewed by a United States Court of Appeals as provided in section 7482 if a petition for such review is filed by either the Secretary (or his delegate) or the taxpayer within 3 months after the decision is rendered. If, however, a petition for such review is so filed by one party to the proceeding, a petition for review of the decision of the Tax Court may be filed by any other party to the proceeding within 4 months after such decision is rendered.

Federal Rules of Appellate Procedure:

RULE 13

(a) *How Obtained; Time for Filing Notice of Appeal.* * * *

The running of the time for appeal is terminated as to all parties by a timely motion to vacate or revise a decision made pursuant to the Rules of Practice of the Tax Court. The full time for appeal commences to run and is to be computed from the entry of an order dispos-

ing of such motion, or from the entry of decision, whichever is later.

* * * * * * *

Rules of Practice, United States Tax Court (Rev. 1958, 1971 ed.):

RULE 19. MOTIONS

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(f) No motion to vacate or revise a decision may be filed more than 30 days after the decision has been entered, except by special leave.

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RULE 31. EVIDENCE AND THE SUBMISSION OF EVIDENCE

(a) *Rules applicable.*—The trials before the Court and its Divisions will be conducted in accordance with the rules of evidence applicable in trials without a jury in the United States District Court for the District of Columbia.

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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners pray that this Court grant rehearing of its order of April 17, 1972, denying the petition for writ of certiorari, in No. 71-1007, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourth Circuit in the above-entitled case as prayed for in the petition filed February 7, 1972.